127-1 (3)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 259.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE COUNTY OF SANTA CLARA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED AUGUST 1, 1885.

The within named sureties are accepted.

RUSSELL & PUTNAM, *For Def'ts.*

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Massachusetts C. C. U. S. No. 131. George Amory Sargent, Sullivan Amory Sargent, Ellen Bacon Sargent, and Mary Turner Burgess, appellants, *vs.* The Massachusetts Hospital Life Insurance Company & Horace Binney Sargent, executor of Lucius Manlius Sargent, deceased. Filed 18th October, 1884.

127-490

(3)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 17, 1887.

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1 & 2 *Transcript on Appeal from Superior Court of Santa Clara County.*

In the Supreme Court of the State of California.

THE COUNTY OF SANTA CLARA
vs.
THE SOUTHERN PACIFIC RAILROAD CO. } No. 9833.

J. H. Campbell, attorney for respondent; J. B. Lamar, attorney for appellant.

3 *Complaint.*

In the Supreme Court of the State of California.

In the Superior Court, County of Santa Clara, State of California.

THE COUNTY OF SANTA CLARA, Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD CO., Defendant.

The plaintiff complains and alleges: That the defendant is a corporation organized and existing under the laws of the State of California.

4 That on the 6th day of October, 1883, the board of supervisors of the county of Santa Clara passed an ordinance entitled "An ordinance imposing county licenses."

That said ordinance provides that it shall be unlawful for any person to engage in or carry on the business or occupation of a steam railroad company in said county without first taking out or procuring a license from the tax collector of the county authorizing him to transact said business, and that he must pay for said license the sum of one hundred dollars per month.

That ever since the 25th day of January, 1884, the defendant has been and now is engaged in and carrying on the business and occupation of a steam railroad company in said county.

That the defendant has not taken out or procured a license from the tax collector of the county authorizing him to transact, engage in, or carry on said business in said county during said time or any part thereof as required by said ordinance.

That said ordinance provides that against any person required to take out a license who fails, neglects, or refuses to take out such license, or who carries on business without such license, the tax collector may direct suit, in the name of the county as plaintiff, to be brought for the recovery of the license tax.

5 That by reason of the premises the defendant is indebted to plaintiff in the sum of one hundred dollars per month from the 25th day of January, 1884, to the filing of this complaint, together with fifteen dollars damages and costs.

That no part of said indebtedness has been paid.

Wherefore plaintiff demands judgment for said sum of one hun-

dred dollars per month from the 25th day of January, 1884, to the filing of this complaint, together with fifteen dollars damages and costs of this suit.

J. H. CAMPBELL,
Att'y for the Tax Collector.

Endorsed: Filed May 10, 1884. W. H. Owens, clerk, by H. E. Wilcox, deputy.

Demurrer.

Title of court and cause.

The defendant demurs to plaintiff's complaint herein on the following grounds, to wit:

I.

The complaint does not state facts sufficient to constitute a cause of action.

II.

6 The complaint is ambiguous, unintelligible, and uncertain in this: First, it does not state the nature or character of the business alleged to be carried on in said county by defendant; second, it does not state when the ordinance alleged in said complaint to have been passed took effect, if ever.

Filed June 7th, 1884.

J. B. LAMAR,
Attorney for Defendant.

Order Overruling Defendant's Demurrer.

Title of court and cause.

The demurrer of the defendant to plaintiff's complaint is overruled.

D. BELDEN,
Superior Judge.

Answer.

(Title of court and cause.)

I.

Now comes the above-named defendant and for answer to plaintiff's complaint herein denies each and every allegation of said complaint.

Defendant refers to and makes part of this subdivision the matter stated in subdivisions II to XVI (inclusive) of this answer.

7 And for further and separate answer defendant avers as follows:

II.

Defendant a corporation. Its place of business. Line of road. Stockholders.

The defendant is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear). The principal place of business of defendant now is and for many years last past has been in the city of San Francisco, State of California. Some of its stockholders now are and ever have been citizens of the United States, resident in States other than the State of California. In the year 1868 it was duly organized under an act of the Legislature of the State of California, approved May 20th, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," and the term of its existence was fixed at fifty years from the date of its organization; and it is still a corporation duly organized under said law, except in so far as its organization, existence, and character may be affected or modified by the Federal Statutes hereinafter referred to.

III.

S. P. R. R. The uses and purposes thereof.

8 As such corporation it constructed a line of railroad and procured the rolling stock and all appurtenances thereunto belonging, known and designated as the Southern Pacific railroad (of California), described as follows: Commencing on the waters of the Pacific Ocean, in the city and county of San Francisco, and extending in a southerly direction through portions of the county of San Francisco and through the county of Santa Clara to Tres Pinos, in the county of San Benito, with a branch therefrom running from Carnadero, in the county of Santa Clara, to Soledad, in the county of Monterey; said line of railroad also extends from Huron, in Fresno county, to Goshen, in Tulare county, and thence in a southerly direction, by way of Tehapechi Pass, Mojave, and Los Angeles, to the Colorado river, at Fort Yuma, with three branches from said line at Los Angeles, extending, respectively, to Santa Monica, Wilmington, and Santa Ana, in the county of Los Angeles. Said line of railroad is connected with the Texas & Pacific railroad at Sierra Bianca, in the State of Texas, by three railroads, to wit: The Southern Pacific railroad (of Arizona), extending from Fort Yuma to the eastern boundary line of Arizona the Southern Pacific railroad (of New Mexico), extending from said eastern boundary line across New Mexico to the western boundary of Texas, and the Galveston,
9 Harrisburg and San Antonio railroad, extending from said last-named boundary to Sierra Blanca. Said several railroads are operated as one continuous line from a point near Marshall, in Texas, to the Pacific Ocean, at San Francisco, for the uses and purposes and in the manner contemplated by the acts of Congress hereinafter referred to.

From Tres Pinos to Huron the said Southern Pacific railroad has

not been completed, but, pending its construction, connection between said points is made over the lines of the Central Pacific railroad. Defendant has completed the construction of the road from said Southern Pacific railroad to the Colorado river, at or near the Needles, to connect with the Atlantic & Pacific railroad hereinafter referred to, and has completed a road from Mojave, on the line of said Southern Pacific railroad, to the said point on the Colorado river, there to connect with said Atlantic & Pacific, and with the said Atlantic & Pacific making a continuous line from Springfield, in the State of Missouri, to the Pacific Ocean, as contemplated by the act of Congress hereinafter referred to chartering the Atlantic & Pacific Railroad Company.

IV.

Length of the road in the several counties.

10 Of said Southern Pacific railroad (of California) there had been, prior to the first Monday in March, 1880, completed and there was in operation in the several counties through which it runs $711\frac{51}{100}$ miles, to wit: In the city and county of San Francisco, $7\frac{36}{100}$ miles; in the county of San Mateo, $25\frac{10}{100}$ miles; in the county of Santa Clara, $59\frac{30}{100}$ miles; in the county of Santa Cruz, $2\frac{15}{100}$ miles; in the county of San Benito, $17\frac{65}{100}$ miles; in the county of Monterey, $49\frac{28}{100}$ miles; in the county of Fresno, $17\frac{93}{100}$ miles; in the county of Tulare, $61\frac{98}{100}$ miles; in the county of Kern, $117\frac{83}{100}$ miles; in the county of Los Angeles, $139\frac{48}{100}$ miles; in the county of San Bernardino, $54\frac{60}{100}$ miles, and in the county of San Diego, $158\frac{85}{100}$ miles, and all within the State of California.

V.

Act of Congress of July 27th, 1866. Atlantic and Pacific act.

On the 27th day of July, 1866, the Government of the United States undertook to construct or cause to be constructed a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route, to the Colorado river, at such point as might be selected, and thence by the most practicable and eligible route to the Pacific Ocean; and to that end Congress passed

11 an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which act was approved on said 27th day of July, 1866, and to said act defendant here refers by title and makes it part of this answer. (See United States Statutes at Large, vol. 14, page 292.) By said act certain persons therein named were made and erected into a corporation under the name and style of the "Atlantic & Pacific Railroad Company."

VI.

Intent of Congress in passing act of 1866.

The intent and purpose of Congress in passing said act was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, with a branch to San Francisco, and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

VII.

Like privileges and immunities granted to defendant.

To facilitate the construction of said road, the Government of the United States, by said act of Congress, adopted the defendant
12 as the instrument or agent of the United States, and conferred upon defendant the same powers and clothed defendant with the same privileges and immunities which it conferred upon and clothed the Atlantic and Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado river and the city and county of San Francisco.

VIII.

Acceptance of the conditions.

Said Atlantic & Pacific Railroad Company organized under said act and obtained *bona fide* subscriptions to the stock of said company to the amount of one million dollars, with ten per centum paid within two years after the passage and approval of said act of Congress; and said company and defendant, immediately after the passage of said act, accepted the terms and conditions thereof and have duly complied therewith.

IX.

Roads constructed under said act.

Said Atlantic and Pacific Company has fully completed the whole of said road from Springfield to the Colorado river, and defendant has constructed said road as aforesaid to Mojave.

X.

Act of Congress March 3d, 1871. Texas Pacific act.

13 On the 3d day of March, 1871, the Government of the United States undertook to construct or cause to be constructed a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado river to construct or cause to be constructed a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the act of Congress of July 27th, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city

of San Francisco; and to that end Congress passed an act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its roads, and for other purposes," approved March 3d, 1870, and subsequently, on the 2d day of May, 1872, passed an act entitled "An act supplementary to an act entitled An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871. To said acts defendant here refers by title, and makes them part of this answer. (See vol. 16, U. S. Statutes at Large, 573; vol. 17, *Id.*, 59.)

XI.

Provisions of said acts accepted by the Texas Pacific Railroad Company and by defendant. Their work thereunder.

14 Immediately after the passage of said act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance thereof, and it and defendant accepted all the terms and conditions of each of said acts of 1871 and 1872, and have fully and in every respect complied therewith, and under them and in compliance with the spirit and intent of said acts have completed the roads mentioned in the third subdivision of this complaint.

XII.

Intent of Congress in passing the acts of 1871 and 1872.

The purpose of Congress in passing said acts was to insure the transportation of the mails, troops, munitions of war, supplies and stores of the United States, and to that end Congress expressly declared in said acts that no act of said companies, or either of them, nor any law of any State or Territory, should ever impede, delay, or prevent said companies, or either of them, from performing their obligations to the United States in that regard.

XIII.

The State of California confirms and vests in the Southern Pacific Railroad Company the rights, privileges, franchises, power, and authority granted to or vested in said company by the several acts of Congress.

15 On the 4th day of April, 1870, the Legislature of the State of California passed an act entitled "An act to aid in giving effect to an act of Congress relative to the Southern Pacific Railroad Company." By the terms of said act and to enable said company to comply with the act of Congress of July 27, 1866, hereinbefore pleaded, and all other acts of Congress then in force or which might thereafter be enacted, it was provided that the right to construct, maintain, and operate by steam or other power the said railroad mentioned in said acts of Congress, and all the rights, privileges and franchises, power and authority, conferred upon or granted to or vested in said company by the said acts of Congress and any acts

of Congress which might thereinafter be enacted, should be confirmed and vested in the defendant. Said act now is and ever since the 4th day of April, 1870, has been in full force and effect. (Statutes 1870, p. 883.)

XIV.

Defendant avers that, under and by virtue of the said several acts of Congress herein referred to, it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several acts of Congress as trustee of the said Government, and for the governmental uses and purposes specified in said acts.

16

XV.

That under and by virtue of the said several acts of Congress and the acts of the Legislature of the State of California herein referred to the defendant was authorized to construct and operate its said railroad and required to use the same for the transportation of the armies, military stores, and for other public purposes, as the said Government might in the exertion of its powers desire to use the same.

The Government of the United States has never given to the States of California or to its authorities the right to levy the license tax demanded by the plaintiff of the defendant. Such a license tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay, and prevent the defendant from performing, as aforesaid, its obligations to the United States, and would nullify and prevent the enforcement of the said several acts of Congress.

XVI.

The defendant has ever since its existence been and now is, in connection with its general railroad business, engaged in carrying the United States mails over its said railroad, including that portion situated in said Santa Clara county, and in performing other

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said duties and trusts conferred upon it by the said several acts of Congress and those conferred upon it by the said several acts of the Legislature of the State of California.

Wherefore defendant asks to be hence dismissed with its costs.

Filed July 18th, 1884.

J. B. LAMAR,
Attorney for Defendant.

Findings.

Title of court and cause.

This cause having been called regularly for trial before the court (a jury trial having been expressly waived by oral consent in open court, entered in the minutes), J. H. Campbell, district attorney, appearing as attorney for the plaintiff, and J. B. Lamar, Esq., appearing as attorney for defendant, and the court having heard the

proofs of the respective parties and considered the same, and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

1. That from the 22d day of February, 1884, to the 23d day of April, 1884, the date of the filing of the complaint herein, there was in force in the county of Santa Clara an ordinance duly
18 passed by the board of supervisors of said county imposing county licenses.

2. That said ordinance provides that it shall be unlawful for any person to engage in or carry on the business or occupation of a steam railroad company in said county without first taking out or procuring a license from the collector of the county authorizing him to transact said business, and that he must pay for said license the sum of one hundred dollars per month, in advance.

3. That ever since the said 22d day of February, 1884, the defendant has been engaged in and carrying on the business and occupation of a steam railroad company in said county without having at any time taken out or procured a license from the tax collector of the county authorizing him to transact said business.

4. That said ordinance provides that against any person required to take out a license who fails, neglects, or refuses to take out such license the tax collector may direct suit, in the name of the county as plaintiff, to be brought for the recovery of the license tax, and in case of a recovery by the plaintiff fifteen dollars damages must be added to the judgment and costs to be collected from the defendant.

5. That no part of said license tax or said damages has been paid.

19 6. That the matters and things set forth in the 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 16 paragraphs of the answer filed herein are true.

As conclusions of law from the foregoing facts the court now hereby finds and decides:

That plaintiff is entitled to a judgment for $300 and $15 damages and costs.

Filed September 8th, 1884.

F. E. SPENCER,
D. BELDEN,
Superior Judges.

Judgment.

This cause came on regularly for trial before the court, sitting in bank, J. H. Campbell, Esq., district attorney, appearing as counsel for the plaintiff, and J. B. Lamar, Esq., for the defendant.

A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court, sitting without a jury, whereupon witnesses upon the part of the plaintiff were duly sworn and examined, and the evidence being closed the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court delivers its findings and de-

cision in writing, which are filed, and orders that judgment be entered in accordance herewith.

20 Wherefore, by reason of the law and findings as aforesaid, it is ordered, adjudged, and decreed that the county of Santa Clara, plaintiff, do have and recover of and from the Southern Pacific Railroad Company, a corporation, defendant, the sum of $300 and $15 damages, with interest thereon at the rate of 7 per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $17\frac{90}{100}$.

Judgment rendered September 10th, 1884.

W. H. OWENS, *Clerk.*
H. E. WILCOX, *Deputy.*

Due service of the within notice acknowledged this 12th day of September, 1884.

J. H. CAMPBELL,
District Attorney, Attorney for Plaintiff.

Notice of Intention to Move for New Trial.

Title of court and cause.

Please take notice that the defendant intends to move the court to set aside and vacate the judgment heretofore rendered, given, and made herein, and to grant a new trial of said cause. Said motion will be made upon the following grounds, viz:

21 I.

Insufficiency of evidence to justify the decision, findings, and judgment of the court.

II.

The findings, decision, and judgment of the court are against law.

III.

Errors in law occurring at the trial and excepted to by the defendant. Said motion will be made upon a statement of the case to be hereafter prepared, served, and filed.

Filed September 12, 1884.

J. B. LAMAR,
Attorney for Defendant.

To J. H. Campbell, Esq., attorney for defendant.

Statement on Motion for a New Trial.

Title of court and cause.

This cause came on regularly for trial on the 25th day of July, 1884, a jury having been expressly waived by the respective parties, J. H. Campbell, district attorney of Santa Clara county, appearing

for plaintiff and J. B. Lamar appearing for defendant; when the following proceedings were had:

W. C. Morrow was called and sworn on behalf of the plain-
22 tiff and testified as follows: "I am now and ever since before the 6th day of October, 1883, have been deputy county clerk of Santa Clara county, and acting as clerk of the board of supervisors. I have here the ordinance book of the board." Counsel for plaintiff then offered in evidence what purported to be an ordinance of the board of supervisors of Santa Clara county, contained in their said ordinance book, extending from page 27 to page 42, inclusive. Said ordinance was signed by H. H. Main, chairman of said board of supervisors, and attested by the clerk, but was not authenticated by any seal. Counsel for defendant objected to the introduction of said alleged ordinance on the ground that the same as it appears on said ordinance book was incompetent as evidence, not being the original ordinance, not being properly authenticated, and no proper foundation having been laid for the introduction of a copy.

The court overruled defendant's objection and counsel for defendant excepted to the ruling of the court. The contents of the ordinance book offered as aforesaid were then introduced and read in evidence and is as follows:

23 *An Ordinance Imposing County Licenses. Enacted October 6th, 1883.*

The board of supervisors of the county of Santa Clara do ordain as follows:

Licenses to be prepared.

SECTION 1. The county auditor must prepare and have printed blank licenses of all classes mentioned in this ordinance for terms of three, six, and twelve months, and for such shorter terms as are herein authorized to be issued, with a blank receipt attached for the signature of the tax collector when sold.

To be signed, numbered, and delivered.

SEC. 2. The county auditor must affix his official seal to, number, and sign all licenses, and, from time to time, deliver them to the tax collector in such quantity as may be required, taking his receipt therefor, and charge him therewith, giving in the entry the numbers, classes, and amounts thereof.

Stumps and license account.

SEC. 3. The auditor must keep in his office the stumps of all licenses by him delivered to the tax collector, and a ledger in which he must keep the collector's account of all licenses delivered to him, sold, or returned unsold by him.

24 When license to be procured.

SEC. 4. It shall be unlawful for any person to engage in or carry on any business or occupation liable to license tax by this ordinance

without first taking out or procuring a license from the tax collector of the county, which license authorizes the party obtaining the same in his town, city, or particular locality in the county to transact the business described in such license. Separate licenses must be obtained for each branch establishment or separate house of business located in the county. No license issued under this ordinance authorizes any person to carry on any business within the limits of any incorporated city or town having power by its charter to impose or levy city or town license taxes, unless such person, in addition to the license provided by this ordinance, also procures the license required by the ordinances or orders of such city or town.

Suit against delinquents. Damages.

SEC. 5. Against any person required to take out a license who fails, neglects, or refuses to take out such license, or who carries on or attempts to carry on business without such license, the tax collector may direct suit, in the name of the county as plaintiff, to be brought for the recovery of the license tax; and in such case either
25 the tax collector or attorney may make the necessary affidavit for a writ of attachment, which may issue without any bonds being given on behalf of the plaintiff, and in case of a recovery by the plaintiff fifteen dollars damages must be added to the judgment and costs to be collected from the defendant.

Tax collector's duties.

SEC. 6. The tax collector must make diligent inquiry as to all persons in the county liable to pay license as provided in this ordinance, and must require each person to state, under oath or affirmation, the amount of business done by him in the next preceding three months, or the firm of which he is a member or for which he is an agent or attorney, or the association or corporation of which he is president, secretary, or managing agent, and thereupon such person, agent, president, secretary, or other officer must procure a license from the tax collector for the term desired and the class for which such party is liable to pay, and in all cases where an underestimate has been made by the party applying the party making such underestimate or the company he represents are required to pay for a license for the next quarter double the sum otherwise required.

Proof on trials.

26 SEC. 7. Upon the trial of any action authorized by this ordinance the defendant is deemed not to have procured the proper license unless he either produces it or proves that he did procure it, but he may plead in bar of the action a recovery against him and the payment by him in a civil action of the proper license tax, together with the damages and costs.

Settlements and payments.

SEC. 8. The tax collector must pay into the county treasury on the first Monday of each month for the use of the county current ex-

pense fund all moneys collected under this ordinance, and must at the same time file with the board of supervisors a detailed statement of all license taxes collected during the preceding month, and from whom and upon what business or occupation the same were collected. Said tax collector must also on the first Monday of January, April, July, and October of each year return to the auditor all licenses unsold and be credited therewith.

Short terms.

SEC. 9. When any business or occupation shall have been commenced after the commencement of the current year, half year, or quarter for which blank licenses shall have been printed, as before specified, the tax collector shall issue a license for the remaining portion of said year, half year, or quarter, and receive therefor the *pro rata* sum required for said license for such unexpired term.

27

Railroads, Express Co's, &c.

SEC. 16. Every steam-railroad company, telegraph company, express company, horse-railroad company, telephone company, electric-light company, gas company, and water company conducting business in this county must obtain a license from the tax collector therefor and pay for the same as follows: Each steam-railroad company, one hundred dollars per month; each telegraph company, fifteen dollars per month; each express company, twenty dollars per month; each horse-railroad company, one and one-half dollars per annum for each car operated; each telephone company, three dollars per quarter; each electric-light company, five dollars per quarter; each gas company, five dollars per quarter, and each water company fifteen dollars per month.

Penalties for violation.

SEC. 18. Every person violating any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or imprisonment in the county jail not exceeding six months.

28

SEC. 20. All ordinances, orders, or acts of this board inconsistent or in conflict with this ordinance are hereby repealed.

SEC. 21. This ordinance shall take effect on the twenty-second day of October, A. D. 1883, and shall be and remain in force from that date until Monday, the sixth day of October, A. D. 1884.

By order of the board.

Passed this 6th day of October, A. D. 1883.

Ayes—Main, Ward, Blythe, Watson, McCleary, Donnelly.
Noes— ——.
Absent—Tillotson.

H. H. MAIN, *Chairman.*

Attest: W. H. OWENS, *Clerk,*
By H. E. WILCOX, *Deputy.*

The witness, W. C. MORROW, was then cross-examined by counsel for defendant, and further testified as follows: "I was sick at the time the ordinance purports to have been passed, and Deputy Clerk Wilcox was acting as clerk of the board of supervisors. I transcribed the ordinance into the ordinance book; I do not remember when, but it was within a short time after the 6th of October, 1883; I cannot say from what I copied the ordinance; it might have been from a newspaper. The ordinance read from the ordinance
29 book was not signed by the chairman or attested by the clerk, as it appears now, until about the 16th of January, 1884."

H. E. WILCOX was called, sworn, and testified for plaintiff as follows:

"I am deputy county clerk; was acting as clerk of the board of supervisors of this county on the 6th of October, 1883. On that day the board of supervisors sent a proposed ordinance, which had been previously prepared by the district attorney, to the Mercury printing office, and on that day the proof-sheet of that ordinance was taken and corrected by the board and adopted by them unanimously as the ordinance, and it was signed by the chairman, H. H. Main, and attested by me as clerk. The proof-sheet so adopted and signed was then returned to the printer. I do not know that the ordinance on this ordinance book corresponds exactly with said proof-sheet as corrected and adopted by the board."

Plaintiff then offered in evidence an order of the board of supervisors contained in the minutes of said board and adopted on the 19th day of February, 1884, reciting that the said license ordinance purporting to have been passed on the 6th day of October, 1883, had been duly published in the San Jose Daily Mercury, a
30 newspaper of general circulation, published in Santa Clara county, for at least one week prior to the time at which it went into effect.

Counsel for defendant objected to the evidence on the ground that the same was incompetent, irrelevant, and immaterial. The court overruled defendant's objection and defendant excepted. The said order was then introduced and read in evidence setting forth the facts above stated.

Plaintiff also introduced the printer's affidavit of publication of said ordinance in the San Jose Daily Mercury, a newspaper published in San Jose, Santa Clara county, for the time prescribed by law.

Plaintiff then rested.

The following allegations and facts set forth in defendant's answer were then by the respective parties admitted to be true:

Defendant has ever since its existence been and now is engaged, in connection with its general business, in carrying the United States mails over its said railroad, including that portion situated in said Santa Clara county, and in performing other said duties and trusts

conferred upon it by the said several acts of Congress and those conferred upon it by the said several acts of the Legislature of the State of California.

31 *Particulars Wherein the Evidence is Insufficient to Justify the Findings and Judgment of the Court.*

I.

The evidence does not show that the ordinance under which this action is brought was passed on or before the first Monday of October, 1883.

II.

The evidence does not show that the said ordinance was duly or legally passed by the board of supervisors.

III.

The evidence does not show that the ordinance or document purporting to be the ordinance, which was introduced in evidence, is the original or a copy of the contents of the ordinance claimed by plaintiff to have been passed on the 6th day of October, 1883; but the evidence does show that said ordinance introduced in evidence as a record on the ordinance book was not signed by the chairman of the board of supervisors or attested by the clerk until March 1st, 1884.

IV.

The evidence does not show that the first Monday of October, 1883, was the 6th day of October, but does show that the 6th day of October, 1883, was a day subsequent to the first Monday.

V.

32 The evidence does not show that the county auditor ever prepared blank licenses as required by said ordinance, or that the tax collector ever directed this action to be brought, or that defendant could have procured the license required by said ordinance.

VI.

The evidence does not show the said ordinance was ever authenticated by the proper seal.

Errors of Law.

I.

The court erred in overruling defendant's demurrer to plaintiff's complaint.

II.

The court erred in admitting in evidence the following documents: The document purporting to be "An ordinance imposing

county licenses, enacted October 6th, 1883;" the order of the board of supervisors declaring the ordinance duly printed; the printer's affidavit of the publication of said ordinance.

III.

The court erred in its findings as follows:

That from the 22d day of February, 1884, to the 23d day of April, 1884, there was in force in the county of Santa Clara an ordinance, duly passed by the board of supervisors of said county, imposing county licenses.

IV.

33 The court erred in its conclusion of law that "the plaintiff is entitled to a judgment of $300 and $15 damages and costs."

V.

The court erred in rendering judgment for the plaintiff and against defendant.

J. B. LAMAR,
Attorney for Defendant.

Order Overruling Motion for a New Trial.

Title of court and cause.

The defendant's motion for a new trial of this action, coming now on regularly for hearing, is argued by counsel and submitted; Luis Arques, Esq., deputy district attorney, appearing for the plaintiff, and J. B. Lamar, Esq., for the defendant.

Whereupon, the court being advised, it is ordered that said motion be, and the same is hereby, denied.

November 17th, 1884.

W. H. OWENS, *Clerk.*

Notice of Appeal.

Title of court and cause.

34 You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this State from the judgment therein made and entered in the said superior court on the 10th day of September, 1884, in favor of the plaintiff and against the defendant, and from the whole thereof, and also from the order denying said defendant's motion for a new trial, made and entered in the minutes of the said superior court on the 14th day of November, 1884.

J. B. LAMAR,
Attorney for Defendant and Appellant.

To the clerk of said superior court and J. H. Campbell, attorney for plaintiff and respondent.

Waiver of Undertaking.

Title of court and cause.

The plaintiff and respondent in the above-entitled cause hereby waives any and all undertakings on the part of the defendant and appellant on appeal in said cause.

November 17th, 1884.

J. H. CAMPBELL,
District Attorney.
L. ARQUES, *Deputy.*

35 *Certificate.*

I hereby certify that the foregoing transcript on appeal is correct and contains true and correct copies of the original papers and records in this cause now on file and of record and a correct statement used on motion for a new trial.

——— ———.

36 *Submission of Cause.*

In the Supreme Court of the State of California.

JANUARY 30TH, 1885.

Submitted on briefs on file in cause No. 9834, County of Santa Clara *v.* The Central Pacific Railroad Company.

THE COURT IN BANK.

37 In the Supreme Court of the State of California. In Bank.

THE COUNTY OF SANTA CLARA, Respondent,
vs.
THE SOUTHERN PACIFIC RAILROAD CO., Appellants. } No. 9833.

On appeal from the superior court in and for the county of Santa Clara.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Thornton, J.

We concur: Myrict, J.; Sharpstein, J.; McKee, J.; McKinstry, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Santa Clara in the above-entitled cause be, and the same are hereby, affirmed with costs.

38 *Opinion. In Bank.* (*Filed April* 27, 1885.)

In the Supreme Court of the State of California.

THE COUNTY OF SANTA CLARA
vs.
SOUTHERN PACIFIC R. R. Co. } No. 9833.

The act of 13th March, 1883 (Stats. 1883, p. 297, which is section 4045 Pol. Code), was superseded and repealed by an act passed on

next day, commonly known as the county government act (Stats. 1883, 297, sec. 25, sub. 27, p. 308). This was so held in *ex parte* Benjamin (3 West Coast Rep., 96).

To take another view, section 184 of the county government act repealed all acts and parts of acts inconsistent with it. (Stats. 1883, p. 365.) Conceding that the act of 13th of March, 1883 (section 4045, Political Code), is only repealed so far as it is inconsistent with the county government act, we find nothing inconsistent in the two acts so far as regards the power to impose the license in question is concerned. The power to impose this tax is plainly conferred by sub. 27 of sec. 25 of the county government act. (*Ex parte* Benjamin, *supra.*) Great caution is required in dealing with the maxim referred to by counsel for defendant, *expressio unius est exclusio alterius.* (See remarks of Lord Chancellor Campbell in Sanders *vs.* Evans, 8 H. L. Cases, 729, referred to by Broom in his Legal Maxims, 640–'1, 627, 6th Am. from London edition, and cases there cited and commented on.) We are of opinion that this maxim, which is a rule of interpretation, has no application here. These acts must be read together and reconciled if it can be done. Repeals by implication are not favored.

So, reading these acts together, we are of opinion that the latter act enlarges the power conferred by the former.

We are of opinion that the ordinance imposing the tax was properly passed by the board of supervisors of Santa Clara county (see sec. 26 of the County Government Act, Stats. 1883, p. 309), and on a day when it could be passed. (*Ex parte* Benjamin, *supra.*)

The provisions of this section (26) appear to have been complied with. The ordinance was signed by the chairman of the board and attested by the clerk. Such is the testimony of the clerk, and there is no other witness.

It does not appear from the record that the seal of the board was copied with the ordinance when the latter was copied in the ordinance book offered in evidence, but we would not hold the ordinance void for this neglect of the clerk to comply with the direction to him in the statute (section 20 of the act last referred to) to record the ordinance at length in the ordinance book. The ordinance having been properly passed, the omission of the clerk to add the seal of the board to the record of it in the ordinance book does not render it invalid.

We find nothing in the other points discussed by counsel, and the judgment and order must be affirmed.

So ordered.

THORNTON, *J.*

We concur:

MYRICK, *J.*,
SHARPSTEIN, *J.*,
McKEE, *J.*,
McKINSTRY, *J.*

39 *Copy of Bond.*

Supreme Court, State of California.

THE COUNTY OF SANTA CLARA, Pl'ff,

v.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Def't.

Whereas the plaintiff in the above-entitled cause recovered judgment in the superior court of Santa Clara county, State of California, on the 10th day of September, 1884, for the sum of three hundred and thirty-two dollars & ninety cents, and upon defendant's appeal to the supreme court of the State of California said judgment was by said supreme court affirmed on the 27th day of April, 1885; and whereas, on the 8th day of May, 1885, the Hon. R. F. Morrison, chief justice of the supreme court of the State of California, allowed a writ of error, at the instance of said defendant, removing said cause to the Supreme Court of the United States;

Now, therefor-, in consideration of the premises of such removal of said cause to the Supreme Court of the United States, we, the
40 undersigned, Charles F. Crocker and A. N. Towne, do hereby jointly and severally undertake and promise, on the part of the said defendant, The Southern Pacific Railroad Company, that the said defendant will pay said judgment and all costs and damages which may be awarded against it upon the final determination of said cause in the Supreme Court of the United States, or on a dismissal of said writ of error, not exceeding the sum of five hundred dollars.

Witness our hands this 12th day of May, 1885.

CHAS. F. CROCKER. [SEAL.]
A. N. TOWNE. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Charles F. Crocker & A. N. Towne, sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says, that he is a resident and freeholder in the State of California, and is worth the sum in said undertaking specified as the penalty thereof over and above all his just debts and —.

41 Due and legal service of the within citation made and admitted this 14th day of May, 1885.

HOWELL C. MOORE,
Dist. Att'y and Attorney for Santa Clara County, Plaintiff and Defendant in Error.

(Endorsed:) Filed May 22nd, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

42 UNITED STATES OF AMERICA, *ss:*

To the county of Santa Clara, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Wash-

ington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein The Southern Pacific Railroad Company, a corporation, is defendant and plaintiff in error and you are plaintiff and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert F. Morrison, Chief Justice of the supreme court of the State of California, this 13th day of May, A. D. 1885, and of the Independence of the United States the one hundred and ninth.

R. F. MORRISON,
Chief Justice.

42½ Due and legal service of the within citation, made and admitted this 14th day of May, 1885.

HOWELL C. MOORE,
Dist. Att'y and Attorney for Santa Clara County, Plaintiff and Defendant in Error.

[Endorsed:] 9833. In the Supreme Court of the United States. The Southern Pacific Railroad Company, a corporation, pl'ff in error, *vs.* The County of Santa Clara, def't in error. Citation. Filed May 22nd, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you, between The County of Santa Clara, plaintiff and defendant in error, and The Southern Pacific Railroad Company, a corporation, defendant and plaintiff in error, a manifest error hath happenened, to the great damage of the said defendant and plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year